CASES CITED.

Supreme Court
OF THE UNITED STATES

EDWARD S. ATWATER, Petitioner, *vs.* STEPHEN G. GUERNSEY, SAMUEL H. BROWN and CHARLES A. HOPKINS, Trustees in bankruptcy of MORTON ATWATER, et al., etc.	October term, 1920. No. 511

Stephen G. Guernsey, Samuel H. Brown and Charles A. Hopkins, as trustees in bankruptcy for all the above named bankrupts respectfully make and file this brief as the respondents herein.

FACTS

The petitioner Edward S. Atwater filed a claim against the individual estate of Eliot Atwater for $75,000, money advanced by him to his son, the said Eliot Atwater, to be used in the purchase of a seat in the New York Stock Exchange. (Page 1 of Record). The trustees in bankruptcy objected to the allowance of the claim and moved to expunge the same. (Page 3 of Record). The matter was referred to a Special Master, who made a report establishing the facts and holding as a conclusion of law that the petitioner was by reason of the execution of certain releases, barred and estopped from asserting his claim and that the petition of the trustees to reject and expunge such claims

4 should be granted. (Page 43 of Record). A decree was made by Mayer, Judge of the United States District Court, for the Southern District of New York, confirming the Special Master's report and ordering that the proof of claim, filed by the petitioner against the individual estate of Eliot Atwater, be expunged and disallowed. (Page 51 of Record). An appeal was taken from the order and decree of said United States District Court to the United States Circuit Court of Appeals for the Second Circuit and a decree was made by that Court affirming the order and decree of the United State District Court.

5 The individuals composing the bankrupt firm entered into an agreement on June 1, 1912, whereby they formed a partnership under the firm name and style of Atwater, Foote & Sherrill. (Claimant's Exhibit 1, Page 38 of Record.)

Under this agreement Eliot Atwater was to put in the use of his membership on the New York Stock Exchange and every six months there was to be paid to him "such an amount as shall pay interest for six months at the rate of six per cent. per annum on $75,000," being the purchase price and

6 initiation fee of his membership on the New York Stock Exchange. Apparently contemporaneously with the signing of the co-partnership agreement, to wit, May 1, 1912, at any rate, on that day, Edward S. Atwater, the petitioner, executed and delivered to Eliot Atwater two releases. (Exhibits A and B, Page 36 and 37 of Record.)

The questions therefore presented to the Special Master were:

A. Did the purchase of the Stock Exchange Seat at the time of its purchase or at any time afterward become the asset and property of the firm? 7

B. Or whether it upon such purchase and ever afterward remained the individual property of Eliot Atwater.

C. If it remained the property of Eliot Atwater is the petitioner entitled to enforce his claim against his son's assets or is he barred by reason of the execution of the releases before referred to?

The Special Master held that the seat was the individual property of Eliot Atwater. (Page 43 of Record.) 8

First: That Eliot Atwater became the individual owner of the seat in the New York Stock Exchange on May 16, 1912, and was such individual owner at the time of the filing of the petition in bankruptcy. (Page 44 of Record.)

Second: The said seat was never the property of the firm of Atwater, Foote & Sherrill.

Third: That by the execution and delivery to said Eliot Atwater by Edward S. Atwater, the petitioner, of the releases, trustees' exhibits A and B as shown in the record, the said Edward S. Atwater was barred and estopped from asserting a claim to the profits of said seat or as an individual creditor of said Eliot Atwater for the moneys advanced toward the purchase price thereof and for initiation fees in said exchange has received precedence 9

in bankruptcy action of the general creditors of the firm of Atwater, Foote & Sherrill.

The U. S. District Court on the 14th day of January, 1920, confirmed the Special Master's report and expunged and disallowed the claim of said Edward S. Atwater against his son, Eliot Atwater, (Page 51 of Record,) and on the 29th day of May, 1920, a decree was made by the Circuit Court of Appeals for the Second Circuit affirming the decree in the United States District Court (Page 62 of Record) and the petitioner herein now seeks to have the decision of the Circuit Court reviewed and the sole question to be considered by this court is (A) whether parole evidence was competent to vary or explain the terms of the original release as against the trustees and (B) whether the releases as evidence are not a bar to appellant's right to establish his claim against said Eliot Atwater. There are no creditors of the firm of Atwater, Foote & Sherrill members of the New York Stock Exchange and no claim has been filed with the trustees by any creditors who are members of such Exchange.

POINT I.

STOCK EXCHANGE SEAT BELONGED TO ELIOT ATWATER AND THE PROCEEDS OF SALE CANNOT BE CLAIMED BY APPELLANT.

All the facts connected with the purchase of the seat, obtaining of moneys to be paid for the same, the purpose and object of the purchase, the dealings of the firm with relation to the seat are conceded, and offer no ground for dispute. The par-

ties themselves interpreted the release between themselves when contributing to the assets of the firm at its creation Eliot Atwater's contribution being "the use of his membership in the New York Stock Exchange" and they further provided that each six months there should be paid to him "interest at the rate of six per cent. on $75,000" being the purchase and initiation fee of his membership in the New York Stock Exchange. The testimony shows that such interest was paid by the firm, therefore, to Eliot Atwater or his father upon the said $75,000. No change was made by the articles of co-partnership affecting or relating to the $75,000 except the firm was to pay interest only on the average selling price of a seat during the preceding six months. The testimony shows that after the new arrangement the amount paid by the firm did not equal six per cent. upon $75,000 to Eliot Atwater. (Record, Page 31.)

It is difficult to understand how on the foregoing conceded facts any controversy can have arisen as to the ownership of the seat in question. *The fact of the ownership by the said Eliot Atwater of the seat in the Stock Exchange is established by the Special Master's report, order of confirmation and decision of the Circuit Court of Appeals.*

That the Stock Exchange Seat purchased by Eliot Atwater, became, when purchased in his own name, the individual property of said Eliot Atwater, may not be questioned when all of the circumstances connected with the transaction are considered together with subsequent exercise of ownership over same by him.

16 Attention is respectfully called to Paragraph Tenth of the Articles of Co-partnership of the firm of Atwater, Foote & Sherrill.

By the terms of that paragraph, Eliot Atwater gives to his partners, Foote & Sherrill an option to purchase from him said seat at the current price which might exist at the time of the dissolution of the firm. This negatives any interest of anybody else in said Seat but is predicated upon the sole ownership of said Eliot Atwater.

The testimony of both father, Edward Atwater, the petitioner and his son Eliot Atwater clearly
17 sustains the intention of the Respondent that said Stock Exchange Seat was property of latter, unencumbered by any claim of his father, the petitioner.

Here it may be parenthetically stated that most testimony was admitted, some of it under objection of which was to explain the transaction between father and son in connection with this transaction and for the purpose of explaining the release by Edward Atwater to his son Eliot Atwater all of which should have been excluded for the reason that the instrument in question (release) is full, complete and clear in its phraseology and general
18 in its terms, with no ambiguity of any kind. This is not an action between the parties to said release to set aside same by fraud or mistake in which case the rules of evidence are greatly relaxed.

Aside from the above the testimony of both Edward Atwater and his son clearly show that the claim of Edward Atwater is an afterthought, one

which was suggested by a more astute mind than his own. He was asked the following question: 19

"Q. When did you first make up your mind that you would present a claim for that amount of money?"

"A. When I was put into the Bankruptcy Court, the whole matter was referred to my attorneys for their opinion." (Record, page 18).

Edward Atwater, further testified:

"Q. Did he (Eliot Atwater) ever agree to repay to you $75,000 at the time you loaned it to him?"

"A. No, I don't think he did." 20

The writer of this brief regrets being compelled to criticise the above question asked by counsel who conducted the trial but it is too apparent that what he intended to ask was, "At the time of this transaction did he ever promise to repay the $75,000"? The word "loaned" was evidently inadvertently used, the transaction constituting a gift and not a loan. It matters not however, as the answer "No, I don't think he did" is entirely sufficient.

The testimony throughout the case clearly establishes a gift. 21

It is most apparent that the petitioner intended the $75,000, the price paid for the Stock Exchange Seat, to be a gift to his son Eliot, the same to be Eliot's contribution to the firm of Atwater, Foote & Sherrill. Apart from the general terms of the release, which he, Edward Atwater, had executed,

22 the force and effect of which he must have known, is as he testified, that he was a member of the Bar of the State of New York, he testified that the $75,000 in question was one source of the capital of the firm of Atwater, Foote & Sherrill. (Record, page 17).

He further testified as follows:

"Q. At the time you signed the paper (release) did you make any agreement with your son that he obligated himself to return the money to you?"

"A. I don't know that I did."

23 "Q. Was anything said by him as to the repayment of this money to you and when?"

"A. No, I don't suppose there was."

Throughout his entire testimony Edward Atwater has denied that there was ever made any promise by his son Eliot Atwater to repay to him the sum of $75,000, and it is too apparent that that sum was a gift to his son and so considered by him and his son, the latter testifying that he thought that there might be a moral obligation on his part to repay that sum to his father.

24 Eliot Atwater further testified that the $75,000 was a "firm asset" (Record, page 24) and that the Seat was a gift to him (Record, page 24) and that his, Eliot's understanding of the transaction was to the effect that his father had released all claim on his part upon the same (Record, page 25) and that there was no legal obligation against him, Eliot in favor of his father (Record, page 25) and

that he, Eliot had never acknowleslged any moral 25
obligation to pay the same. (Record, page 25).

From the above it is too plain that the understanding, purpose and intent of both father and son, the petitioner and Eliot Atwater, at the time of the purchase of the Seat and execution of the release were that the same should constitute and carry into effect a gift inter vivos between the father and the son, of the purchase price of said Seat, and that said Seat should be Eliot Atwater's contribution to the firm assets of Atwater, Foote & Sherrill.

If therefore this contention is right, and at that 26
time the purpose of the two parties to the release was as above indicated, can the petitioner at this time successfully attack that gift and maintain that the transaction was only intended as a loan, the same to be recovered at a subsequent and indefinite time? Edward Atwater, the petitioner, had full knowledge, as the testimony shows, that the firm was holding itself out to the public as a member of the New York Stock Exchange. Can it be successfully contended that such representation did not give additional credit to that firm with the public? Edward Atwater enabled the firm to obtain large 27
credit and eventually cause serious loss to its customers. It is respectfully submitted that it is too late now for him to attack the gift made to his son, especially so, as the interest of creditors intervene.

The fact that Eliot Atwater did from time to time pay to his father interest on said sum in no way changes the character of the transaction any more

than it would have, had the petitioner given to his son a general warranty deed of real estate should said real estate have been turned over to the firm as an asset, though thereafter Eliot Atwater had seen fit to pay his father rent for the same.

None of the cases relied upon by the petitioner are on all fours with the instant case. In the present case there is no promise to pay, no evidence of indebtedness and acknowledgment of same. The release, general in its terms, standing as it does binding upon the petitioner may not be attacked at this time and in this manner.

To avoid the effect of same it is respectfully submitted that a suit in equity for that purpose would have to be instituted in which all persons interested would have to be made parties.

This eleventh hour attempt to alter what is apparently a gift, into a loan, is manifestly for the purpose of defrauding creditors who relied upon the standing and reputation and financial credit of the firm of Atwater, Foote & Sherrill which credit etc., was contributed to in no small part by the possession and ownership of the Seat on the New York Stock Exchange.

POINT II.

THE APPELLANT IS ESTOPPED FROM ASSERTING HIS ALLEGED CLAIM AS AGAINST THE FIRM OR INDIVIDUAL CREDITORS.

Estopped by releases under seal.

An examination of the releases which are under seal and appear in Pages 36 and 37 of the Record

shows that they not only released Eliot Atwater 31
from all claims and demands, but especially by reason of the advance of $73,000 by the father, the appellant, to enable him to buy a seat and to pay his initiation fee in the Stock Exchange. These releases are still in force and have never been surrendered or cancelled. They were delivered by the father to his son, Eliot Atwater, who in turn delivered them to the New York Stock Exchange. (Record, Page 4.)

After their delivery to the son, by him to Stock Exchange, there was no liability of any kind on the part of Eliot Atwater to repay such sum to his 32
father, Edward S. Atwater, the petitioner. There does not appear in the Record any evidence of any revival of the debt after the delivery of the releases nor is there any proof of any promise to pay the money or revive the debt. On the contrary testimony of Eliot Atwater on this subject given before the referee is as follows:

"Q. I read from the minutes at the adjourned first meeting of creditors taken before Harry Arnold, Esq., Referee, under date of June 22, 1918, at page 784: (Record, Page 24)

33
Q. Did your father Edward S. Atwater sign that release? A. He did.

Q. Stating to the Exchange and to the Secretary that there was no claim whatsoever upon that seat? A. That's right.

Q. And that the Seat was a gift to you? A. I am merely stating my recollection.

34 Q. Was the paper in writing that you produced? A. Yes, sir, what I saw in 1912 and am stating my best recollection.

Q. It was your understanding at the time and has been since that the papers executed by your father and the conditions under which the purchase of this Seat was made had to be an absolute gift in order for you to own that Seat? A. I understood it had to be released on his part of all claim.

Q. And that he had no claim against you personally for it, is that correct? A. I considered he
35 had a moral claim against me for it.

Q. You owed a moral obligation to him? A. Yes, sir.'

Q. Do you recall so testifying? A. If you read it I will agree that I testified to it.

Q. I am reading from page 785 of the same testimony: (Record, Page 25)

'Q. So far as the deal itself was concerned, from your talks with your father and from the papers you understood had to be signed, it was a gift to you? A. I have no talks with my
36 father, but I understood from the paper that there was no claim against me legally by him.'

Q. Do you recall so testifying? A. If it is in there, I testified to it.

Q. Was the testimony I have read to you true, and the answers you made true? A. Yes, sir, as to my conception of it at that time.

Q. I am reading from page 795 of the same testimony: (Record, Page 25) 37

'Q. Did you ever acknowledge any moral obligation? A. No, sir.'

Q. Do you recall so testifying? A. I don't know what it applies to. If it is in there as my testimony, I said so."

It will be noticed that in the foregoing testimony Eliot Atwater states that he owed a moral obligation to his father, but, at folio 146, he testified as follows:

38

"Q. Did you ever acknowledge any moral obligation? A. No, sir."

We call attention to Eliot Atwater's understanding to the effect of the release, although the release speaks for itself. In his testimony, (Record, Page 27, Folio 54) "I understood from the paper that there was no claim against me legally by him."

Edward S. Atwater, the appellant, further testified (Record, Page 12) that the subject of this advance of $75,000 for the purchase of the seat was never discussed between him and his son after he had advanced the money, *and that he does not remember that his son ever agreed to repay the money to him*, and, (Record, Page 26) he testifies that his son never made any statement to him relative to the money or made any agreement with him for the repayment of the money and that he had no memorandum or promise. 39

40 The testimony which is quoted above was given by Eliot and Edward S. Atwater shortly after the filing of the petition in bankruptcy at the hearing at the first meeting of creditors.

It is thus entirely clear from the testimony of the bankrupt and his father the appellant that the original debt was released, and that there was no legal or moral obligation to repay the money.

It has been claimed by the counsel for the appellant in his brief that the payment of the interest to the father by the son, and afterwards by the firm to the son, shows an intent to revive the obli-
41 gation, notwithstanding the absolute release thereof in writing and under seal.

We respectfully submit that, in view of the testimony, the payment of this interest does not in any way prove the existence of a debt from the son to the father, even between themselves, and certainly not as against creditors.

It must be noted that in the first partnership agreement it was provided between the partners that interest should be paid to Eliot Atwater at the rate of 6 per cent. upon the $75,000, the pur-
42 chase price and initiation fee of his membership on the New York Stock Exchange, and that in the second agreement interest was paid to Morton Atwater on the amount of capital furnished by him, and also the same provision was contained in reference to the payment of interest to Eliot Atwater upon the value of his New York Stock Exchange seat, and interest was also agreed to be paid to Gilbert F. Foote upon the value of his Cotton Ex-

change seat. *What arrangement there was between Eliot Atwater and his father which induced him to hand over the interest received by him from the firm does not appear, and in the face of the positive evidence shown by the releases that no debt was existing and the absence of any proof reviving the debt as a legal or moral obligation, the mere payment of interest by the son to the father, or afterwards directly to the father by the firm during the absence of his son, created no legal or moral liability for the repayment of the principal*, and the fact that the interest was so paid has no probative force in this proceeding to establish any debt in favor of the appellant. 43 44

No legal liability having been established, the question arises, could there be any moral liability which would enable the petitioner, Edward S. Atwater to enforce his claim against his son in bankruptcy? It must be remembered that even if there were any moral obligation, it could only be used in certain cases as a consideration for a new promise to pay the debt after the giving of the releases.

Assuming, for the sake of argument, that an inference might be drawn from any testimony, facts or circumstances presented in the record, of a promise to repay this money, there would be no consideration to support it, and it would not revive the debt, because it has been well settled by authority that where a person voluntarily releases a debt due him no moral obligation upon the part of the debtor survives which would furnish an adequate consideration for a subsequent promise to pay. It is only where the creditor is forced by in- 45

46 voluntary proceedings to release his debt that there remains the moral obligation which would furnish a consideration for a promise to repay it.

(See *Taylor v. Hotchkiss* and cases cited, 81 App. Div., p. 470, at pp. 475-476; affirmed in Court of Appeals, 179 N. Y. 546.)

It thus appears that any debt existing in favor of the father against the son was absolutely extinguished by the releases and was never revived.

Counsel for appellant ingeniously argues in his brief that the effect of these releases could only be

47 invoked by creditors who were members of the Stock Exchange, and that other creditors cannot take advantage of it. *It is urged on behalf of the trustees that this release was effective not only in so far as it related to the members of the Stock Exchange, but was* also in favor of all persons who had dealings with the firm of Atwater, Foote & Sherrill and became creditors of such firm or of Eliot Atwater. While as between the parties Eliot and the appellant, Edward S. Atwater, some such arrangement might have been made, this Court, under the circumstances and in view of the facts

48 hereinafter shown that the firm advertised that they were members of the New York Stock Exchange, will not permit Edward S. Atwater to now re-assert his claim either as against the creditors of Eliot Atwater or creditors of the firm.

This Court will not lend its aid in the enforcement of such an alleged obligation, as the appellant now asserts, after his conclusive release of

any debt he had, by written releases, under seal and his acts tending to deceive the firm creditors as well as the Exchange. 49

The appellant does not come into this Court with clean hands. On the contrary, he wishes the aid of the Court in helping him to perpetrate a fraud. He admits that his son could not purchase a seat on the Exchange unless the obligation to repay the money loaned to him for the purchase of the seat was expressly released in writing, and also that his son had to make a statement that he was the sole owner of the seat on the Stock Exchange without any encumbrance.

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Having released his claim and allowed his son to make the above statement, the obligation of his son to him was extinguished absolutely. While it may be true that the main purpose of the rules of the Exchange in requiring a person who loans money to another wishing to purchase a seat on the Exchange is to protect its own members, the release does not contain a limitation of this kind, and such limitation cannot be read into it now for the purpose of defeating the claims of other creditors.

A similar question was passed upon by the Court, Southern District of New York in Matter of *J. M. Fisk* & *Co.*, decided by Seaman Miller, Esq., Referee, under date of July 12, 1912, whose findings were confirmed without opinion by a former Judge of the United States District Court, Hon. George C. Holt. 51

In that case, Eugene R. Washburn, the father, made a claim for $85,500 advanced to his son for

52 the purchase price of a seat on the Stock Exchange. Releases exactly like the ones in this case were given by the son to the father, and simultaneously with the execution of the release, the son gave the father his promissory note, promising to pay the sum of $85,500. The Referee said:

> *"In my opinion, the note in no way affected adversely the creditors of J. M. Fisk & Co., as the father had by the foregoing instrument in writing released the whole world from the payment of the sum involved in the original transaction whereby the Stock Exchange seat*
53 *was purchased."*

That case was much stronger than the case at bar, for in the former there was an actual written promise to pay the released indebtedness. The Court expunged the claim both against the firm and against the individual partner.

The appellant urges in his brief that his claim should be allowed under the authority of *Sterling v. Chapin*, 185 N. Y., 395. A careful reading of this case will enable this Court to note the distinction between it and the case at bar.

54 *Sterling v. Chapin* (*supra*) was an action for a co-partnership accounting between two brothers—the plaintiff's testator and the defendant. No question arose in that case as to the rights of creditors of the firm. The question decided was merely as to the rights between the partners, one of whom, the deceased partner, had advanced all the money for the purchase of the seat. While the deceased partner had given a release to the Exchange sim-

ilar to the one in the case at bar, there was not any 55
evidence that was ever delivered to or even seen or heard of by the defendant. An account was opened in the books of the co-partnership several days after the execution of the release and was carried on such books at the time of its dissolution, and in that account the defendant each year exclusive of the one ending when the co-partnership was dissolved, was charged with interest upon the balance shown to be due from him, and was credited with various payments—the balance at the date of its dissolution due from him being $37,708.80. In addition to which the defendant more than two and one-half years after the execution of the release 56
wrote to his brother a letter which acknowledged his indebtedness to him of the amount so charged against him. The Court of Appeals in making its decision said, at page 402:

> "Many days after the release was executed the defendant charged himself upon the co-partnership books with cash advanced for his seat. These entries mean that on that day the firm advanced said money, and first became his creditor upon the transaction in question."

The court continuing said (p. 403):

57

> "What I emphasize is, that we have here an uncontradicted and unexplained admission of the defendant, by entries which are binding upon him, that upon a certain date the co-partnership advanced money to or for him, and that this co-partnership indebtedness was not affected by a prior individual release of one co-partner."

58 *Attention is again called to the fact that no rights of creditors were in any way affected, and that the testator had supplied the entire co-partnership capital,* out of which money was advanced for the purchase of the seat, and the Court said, at the foot of page 400:

> "If a co-partnership transaction, it would not have been strange or conclusive against plaintiff's claim, if in a release, not having that point in mind, he had definitely recited that the advance was made by himself; but this he did not do."

59 The Court further treated the moneys advanced for the purchase of the seat as a part of the capital of the firm and said (p. 401):

> "When we consider the facts that subsequently the parties by an account with items extending over seven or eight years expressly and continuously admitted that the co-partnership advanced money with which to purchase the seat, and that the defendant was indebted to such co-partnership for such advance, all uncertainty vanishes, and we have
60 proof which is conclusive upon this appeal that the matter was a co-partnership and not an individual transaction."

ESTOPPEL BY REASON OF OTHER ACTS.

An examination of the record discloses that from the inception of this firm down to the filing of the petition in bankruptcy it advertised extensively in

newspapers in the City of Poughkeepsie as "Members of the New York Stock Exchange," and all of their stationery, including their checks, bore this statement, and this fact was also prominently lettered on the windows of their offices. 61

That the firm was so advertising and holding out to the world that they were "Members of the New York Stock Exchange" was well known by Edward S. Atwater, the petitioner herein. (Record, page 22).

The words "Members of the New York Stock Exchange" certainly conveyed to the public the impression that the firm owned the seat and was a representation that it was a part of the firm assets. 62

Having acquiesced in the representations as to the ownership of a seat, and having absolutely released all claims against his son, the petitioner is estopped from asserting his claim as against creditors who relied on the fact that the firm was the owner of this seat, and the Court must at least hold that the petitioner's rights are subordinated to the claims of creditors who traded with this firm on the strength of the fact that it was, or one of its members was, the owner of the Stock Exchange seat.

The release was executed and delivered to Eliot Atwater for the purpose of showing to the Exchange that Eliot Atwater was freed from any indebtedness by reason of the loan, and thus made him solvent and able to perform financially his obligations. It cannot be now claimed that in fact the indebtedness was not discharged and that simultaneously with the execution of the release, or at 63

64 the time the loan was arranged, Eliot Atwater agreed to repay the same. If this were so the effect was to deceive the Exchange and the customers of the firm who dealt with it in reliance on the fact that the firm owned the seat.

The Court will not lend its aid in the enforcement of a contract the result of which was to deceive the customers of the firm.

POINT III.

65 **WITH RESPECT TO THE CREDITORS OF THE FIRM, THE RESPONDENTS' CONTENTION IS, THAT THE NEW YORK STOCK EXCHANGE SEAT WAS A CO-PARTNERSHIP ASSET.**

An examination of the testimony shows that it was a contribution to the capital of the firm by Eliot Atwater. This was admitted by the appellant at Record, page 17, where, in answer to a question as to whether the seat was one source of the capital that the firm of Atwater, Foote & Sherrill were to have, he replied, "Yes, sir, that was it." and Eliot Atwater, after stating that there was no
66 obligation to his father at the time the seat was bought, stated (Record, page 24), that the seat was his contribution to the firm assets and his reason for getting in the firm.

Harold Sherrill testified that Morton Atwater's contribution of the capital of the firm was to be $50,000, and Eliot Atwater's contribution was that he contributed the seat.

It is now argued on behalf of the appellant that 67
the co-partnership agreement indicates that the
seat was not a contribution to the firm, but that its
use was merely given to the firm. It will be noted
that the same thing might be said of the $50,000
working capital which Morton Atwater contrib-
uted, because, taking the language of the agree-
ment, it is stated that "Morton Atwater furnishes
to the partnership the loan of $50,000 working cap-
ital" and that Eliot Atwater furnishes "the use of
his membership on the Stock Exchange." Both
these contributions, it will be noted by the agree-
ment, were contributions to the *capital* of the firm,
and the fact that in one case where the money was 68
contributed it is stated to be a loan to the firm, and
in the other case where the seat is contributed it is
stated to be the use of the seat, does not alter the
fact that both made up the capital of the firm, and
Morton Atwater could not appear as a creditor un-
til other creditors were fully paid, nor could Eliot
Atwater claim his seat until creditors were fully
paid.

The Court must determine the question as to
whether the seat was a co-partnership asset, not
only from the testimony of the parties themselves
above referred to, but also in the light of all cir- 69
cumstances surrounding the purchase and use of
the seat by a co-partnership of stock brokers.

Under the rules of the Stock Exchange the firm
as such cannot have a seat in its name. It is al-
ways placed in the name of one of the partners,
even although the firm may contribute the money
for its purchase. It is for this reason that the seat

when purchased is placed in the name of a member of the firm. In fact, the appellant took part in the negotiations which led to the formation of this firm and testified (fols. 96 and 97) that there was talk about financing it, and as to whether they would need any capital, and the first talk that he had was, that he would furnish the means to buy a seat on the New York Stock Exchange, and that that was not enough, because Foote & Sherrill (the established firm into which the Atwaters were entering) felt as well as the Atwaters themselves, that they needed more money to do the business and the appellant said he was ready to contribute more. Whatever he contributed was put in by his son Morton Atwater as part of the capital of the firm.

It is perfectly clear that, inasmuch as under the rules of the Exchange the legal title to the seat had to be in the name of some individual member of the firm, and as it was a contribution to the *capital* of the firm by Eliot Atwater, it had to remain in his name. By reason of said rules it was necessary in preparing the co-partnership papers to so word the agreement as not to violate the rules.

All contributions to the capital of a firm are for the use of the firm. On dissolution such capital (if the firm is solvent) is returned to the respective contributors. When Eliot Atwater contributed the use of his seat on the Exchnage, he contributed the seat iself as a part of his capital.

Attention is also called to the fact that objection was made to the parole evidence introduced by the

appellant which tended to contradict the effect of the sealed releases. We think this objection was perfectly valid, inasmuch as the trustees was a privy of one of the parties to the release, to wit: Eliot Atwater. The rule is too well settled to require argument that parole evidence cannot be used to controvert or vary a written instrument in an action or proceeding as against the parties to the instrument or their privies. 73

POINT IV.

THE AUTHORITIES CITED BY THE APPELLANT DO NOT SUSTAIN HIS CONTENTION AS TO THE EFFECT OF THE RELEASE. 74

The appellant seeks to evade the effect of the estoppel created by the acts of his son and himself by now claiming that he can assert his claim against his son after rights of creditors have intervened, and the decisions cited by him page 24 of his brief attached to the moving papers on his application for a writ of certiorari are only authority that in certain cases the conditions connected with the execution of a paper may be shown. But they cannot be considered to mean that the legal effect of an instrument may be altered by parole evidence long after the real transaction, when its effect will be to deprive creditors of their security. 75

Circuit Judge Manton in writing the prevailing opinion herein says:

> "The release here does not contain any limitation which would indicate an intent at the

76 time of its execution, of a conditional delivery so as to satisfy the requirements to purchase a membership upon the Exchange. We cannot read into the language of the release such limitation and thus defeat the claims of other creditors. The appellant was an attorney at law, although not actually engaged in practice. He had full opportunity to read and understand the force and effect of the document he executed. He released the whole world from payment of the sum involved. He represented not only to the Stock Exchange members, but to everyone that so far as he was concerned, his
77 son owed him nothing for the Stock Exchange membership. Nor can we support the claim of the appellant, because he received interest on the loan of Seventy-five Thousand Dollars from his son against this sealed and solemn instrument of release. We think he is estopped from asserting his claim."

The only case cited by the petitioner which is at all applicable to the facts of this case is Sterling vs. Chapin (185 N. Y. 395) which we have already distinguished. Judge Manton says of that case that the action there was for an accounting between
78 the parties.

The brief of the petitioner is based upon the assumption that the parties intended the release to be operative only so far as the Stock Exchange seat was concerned. We challenge this assumption and say it was only after the bankruptcy that the petitioner conceived that idea. Eliot Atwater says (Record, page 27):

"I understood from the papers there was no claim against me legally by him." 79

Edward S. Atwater, the appellant, says at folio 119 of Record, his son never made any statement to him relative to the money or made any agreement with him for the repayment of the same and that he had no memorandum or promise.

In view of the testimony just quoted how can it now be claimed that the intention of the parties was to preserve the debt, and that therefore it can be claimed a limited effect of the release should recreate the debt as against creditors, which was 80 created without any reservations whatsoever in the releases or between the parties?

POINT V.

THE PETITION SHOULD BE DISMISSED AND THE WRIT OF CERTIORARI PRAYED FOR SHOULD NOT BE GRANTED.

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